ALAN WILSON
ATTORNEY GENERAL

March 20, 2012

Joseph L. Mathis, Esquire
Saint-Amand, Thompson & Mathis, L.L.C.
219 South Limestone Street, Suite 1
Gaffney, South Carolina 29340

Dear Mr. Mathis,

We understand that your law firm, as general counsel for Cherokee County (the "County"), would like to request an opinion on behalf of the County Council as to its authority to fund a scholarship program proposed by community members of the County that would provide tuition assistance to students who attend a local technical college and meet certain qualifications. You provide us with the following information concerning the scholarship program:

> Specifically, the proposed initiative requests that the [County] Council fund a K-14 Scholarship Plan by an appropriation of annual county funds to be allocated among the scholarship recipients. The proposed plan as presented to the [County] suggests the following Qualifications, Details, Steps to Apply and Cash Flow Considerations:
>
> Qualifications:
>
> 1. [County] residents for 12 previous months (consecutive).
> 2. Have a high school diploma or GED (accredited).
> 3. Must enroll within one year of achieving GED or high school diploma (waived for qualified Veterans).
> 4. Must not test into any remedial courses.
> 5. Must have exhausted all federal, state, and other resources for tuition assistance.
>
> Proposed Scholarship Details:
>
> 1. Only available for two consecutive fall and two consecutive spring semesters.
> 2. Covers only tuition, lab fees (if applicable), and enrollment fees.
> 3. The application fee, textbooks, and other incidental needs are not covered by this scholarship.
> 4. WIB (Work Force Investment Board) may be able to help with students who do not qualify and those who do qualify but need additional assistance. References will be made.

Steps to Apply:

1. Apply to Spartanburg Community College[1] (SCC), pay application fee (currently $25).
2. Complete and submit FAFSA (Federal Financial Aid application).
3. SCC Financial Aid Department will determine eligibility.
4. Student will be notified by SCC about award determination.

Cash Flow Considerations:

1. Funds will be held by [WIB].
2. SCC will send a list of qualified recipients and dollar amount per student to WIB and to SCC Business Office.
3. WIB will forward payment to SCC Business Office.
4. SCC will return funds to WIB for students who do not attend, or dropped classes based on the same dates and requirements as federal financial aid.

Specifically, you indicate the County Council would like an opinion as to whether a scholarship fund for the education of its citizens constitutes a public and corporate purpose. If so, the County Council would like to know whether the legality of the program would be affected "if such awards are granted to students attending private institutions versus public institutions." After further discussion, it is our understanding this question was intended to ask whether the legality of the scholarship program would be affected if students attending a private institution are allowed to participate as well.

Law/Analysis

County's Authority to Fund Program

As we have previously observed, the autonomy and authority of counties has increased significantly since the advent of Home Rule. Op. S.C. Att'y Gen., 2005 WL 1983356, *1 (August 8, 2005). The relevant provisions of the South Carolina Constitution, often referred to as the Home Rule Amendments, are found in Article VIII. Section 17 of Article VIII provides:

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

The Constitution charges the General Assembly with the duty of "provid[ing] by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties ...." S.C. Const. art. XIII, § 7. Consistent with this constitutional mandate, the General Assembly enacted the Home Rule Act,

[1] It is our understanding "Spartanburg Community College" is intended to refer only to the Cherokee County Campus. It is also our understanding that SCC is the only state-supported technical institution located within Cherokee County.

S.C. Code sections 4-9-10 et seq., concerning counties, and section 5-7-10 et seq., concerning municipalities. Counties were granted broad legislative powers through the enactment of section 4-9-25 in 1989:

> All counties of the State...have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of the counties.

See also § 5-7-30 (similar provision applying to municipalities).

Our Supreme Court recognized in Williams v. Town of Hilton Head, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) that "by enacting the Home Rule Act...the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government." As the Court explained, the doctrine of Dillon's Rule provided that a municipal corporation possessed only those powers expressly granted, "those necessarily or fairly implied" from such express powers, and "those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable." Id. at 421, 429 S.E.2d at 804. Considering Article VIII in conjunction with the Home Rule Act, the Court concluded municipalities now have the authority to "enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, *obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and the general law of the state.*" Id. at 422, 429 S.E.2d at 805 (emphasis added).

Although Williams did not expressly address whether Dillon's Rule has been abolished as to county governments as well, we have previously stated that "Williams would certainly be of great precedential value in arguing that Dillon's Rule has been abolished as to county governments." Op. S.C. Att'y Gen., 1995 WL 67622, *2 (January 19, 1995). Several decisions issued by the Court since Williams provide further support for such an argument. In Hospitality Ass'n of S.C., Inc. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995), the Court upheld the validity of ordinances enacted by a town, city, and county that imposed fees on the proceeds of certain sales and services. In so doing, the Court found that both counties and municipalities had the authority to enact such ordinances under the "broad grant of power" afforded them under sections 4-9-25 and 5-7-30, and further noted such ordinances "are valid unless inconsistent with the Constitution or general law of this State." Id. at 226-27, 464 S.E.2d at 118. Furthermore, the Court has since recognized that counties possess general police powers under section 4-9-30 of the Home Rule Act. See Greenville County v. Kenwood Enterprises, 353 S.C. 157, 577 S.E.2d 428 (2003). Specifically, the Court concluded:

> [W]hile the Comprehensive Planning Act governs zoning, it simply does not evince a legislative intent to completely prohibit any other local enactments from touching upon zoning or land use. That fact, in conjunction with the liberal reading we are required to give section 4-9-25, compels us to conclude that this

> type of ordinance may be properly enacted pursuant to the County's police powers.

Id. at 165-66, 577 S.E.2d at 432 (citation omitted). In light of the above, this Office is of the opinion that Dillon's Rule has been abolished as to county governments.

Turning to the issue of whether the County Council has the authority to fund the scholarship program, the General Assembly has granted each county government certain enumerated powers which may be exercised "within the authority granted by the Constitution and subject to the general law of this State ...." § 4-9-30. Under subsection (5)(a) of that provision, counties are specifically empowered to:

> to assess property and levy ad valorem property taxes and uniform service charges...and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above....

§ 4-9-30(5)(a) (emphasis added).

Nothing in section 4-9-30(5)(a) or any other statutory provision that we are aware of expressly grants a county government the power to appropriate funds in the form of tuition assistance to residents of the county. Nor are we aware of any statutory provision which expressly prohibits a county from doing such. Consistent with the Supreme Court decisions and the opinions of this Office addressing the authority of local governments under Article VIII and the Home Rule Act, the absence of express statutory authority in this case does not preclude the County Council from having the requisite authority to fund the scholarship program; the County Council has such authority unless the appropriation of funds for such a purpose is inconsistent with the Constitution or the general law of this State.

As we have previously stated, "[i]t is well-settled that the expenditure of [public] funds must be for a public, not a private purpose." Op. S.C. Atty. Gen., 2003 WL 22050883, *3 (August 29, 2003); see also Elliott v. McNair, 250 S.C. 75, 86, 156 S.E.2d 421, 427 (1967) ("All legislative action must serve a public rather than private purpose"); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). This principle is recognized in several provisions of the South Carolina Constitution. Article X, section 14(4) provides that the political subdivisions of the State may incur general obligation debt "only for a purpose which is a public purpose and which is a corporate purpose of the applicable political subdivision." Article X, section 5 requires all taxes to have a stated public purpose to which the proceeds must be applied.

The South Carolina Supreme Court has described a "public purpose" as follows:

> In general, a public purpose has for its objective the promotion of the public health, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political subdivision.... It is a fluid concept which changes with time, place, population, economy and countless other circumstances. It is a reflection of the changing needs of society.

WDW Properties v. City of Sumter, 342 S.C. 6, 13, 535 S.E.2d 631, 634 (2000) (citations omitted).

The Court has developed the following four part test to determine whether the "public purpose" requirement has been met:

> The Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

Nichols v. S.C. Research Authority, 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986).

The issue before us is whether the use of County funds to provide tuition assistance to County residents attending a local, state-supported technical institution, meets the public purpose test. "The legislative determination as to what constitutes a public purpose or public need is entitled to great weight." Carll v. S.C. Jobs-Economic Development Authority, 284 S.C. 438, 443, 327 S.E.2d 331, 334 (1985). Courts will not invalidate legislation if its provisions are reasonably related to a legitimate public purpose or goal. See Id. ("the question before this Court is whether the provisions of the Act are reasonably related to its legitimate public goals"); see also Elliott v. McNair, 250 S.C. 75, 88, 156 S.E.2d 421, 428 (1967) ("courts cannot interfere with what the General Assembly has declared to be a public purpose...unless the judicial mind conceives that the legislative determination is without reasonable relation to the public interest or welfare and is beyond the scope of legitimate government").

Although you ask whether a county scholarship fund for the education of its citizens constitutes a public and corporate purpose, we have not been provided with any determinations of the County Council as to the specific purposes or objectives of the scholarship program. As we have stated on numerous occasions, this Office is not empowered to conduct investigations and make factual determinations. See, e.g., Ops. S.C. Att'y Gen., 2008 WL 3198121, *2 (July 28, 2008); 1985 WL 165976, *4 (January 21, 1985). Thus, the issue of whether the appropriation of County funds in support of the proposed scholarship program meets the public purpose test must ultimately be decided by a court.

Nevertheless, our Supreme Court has recognized "the promotion of higher education in the State" as a valid public purpose. Durham v. McLeod, 259 S.C. 409, 414, 192 S.E.2d 202, 204 (1972) (upholding validity of legislation authorizing state agency to issue loans to students attending "any institution of higher learning"). The Court has also recognized that "[a] county has an interest in promoting and providing for the education of its citizens." Grey v. Vaigneur, 243 S.C. 604, 610, 135 S.E.2d 229, 232 (1964) (holding Constitution did not prohibit county from issuing bonds to assist a coextensive school district with the construction of public school facilities). Several opinions of this

Office are in accord. See, e.g., Op. S.C. Att'y Gen., 1985 WL 259146, *5 (March 19, 1985) ("There is little quarrel with the fact that education, including higher education, generally serves an important public purpose"); 2005 WL 1983356, *8 (August 8, 2005) ("the promotion of education in the county is within that county's corporate purpose"). In addition, we recognized in a 1986 opinion that "[the] expenditure of public funds for tuition assistance generally meets the public purpose test." 1986 WL 289767, *1 (March 17, 1986). In light of the above, we believe the County has a legitimate interest in promoting higher education in the County.

We recognize the argument could be made that the provision limiting the program's benefits to County residents attending a single institution, SCC, is not reasonably related to the promotion of higher education since it necessarily excludes County residents attending any other institutions of higher education. However, we find significance in the fact that SCC is the only state-supported technical institution located within the County. The technical institutions of this state provide educational opportunities and specialized training programs distinct from other institutions of higher education. For example, the General Assembly has declared that all state technical institutions such as SCC have the primary objective of "providing training for prospective employees for *prospective and existing industry* in order to enhance the *economic development* of South Carolina." § 59-103-15(4) (emphasis added); see also §§ 59-53-20, -50(10) (generally stating State Board of Technical and Comprehensive Education has duty to provide training for new and expanding industry that is closely coordinated with state's economic development efforts) (emphasis added).

Section 4-9-30(5)(a) specifically identifies economic development as a purpose for which a county may levy taxes and make appropriations. In addition, the Court has recognized the fostering of industrial and economic development as a legitimate public purpose. See Ed Robinson Laundry and Dry Cleaning, Inc. v. S.C. Dept. of Revenue, 356 S.C. 120, 588 S.E.2d 97 (2003) (recognizing government has legitimate interest in fostering economic development); Nichols v. S.C. Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986) (recognizing industrial development as public purpose for which public funds may be appropriated). Thus, under the circumstances of this case we believe a court would find the provision limiting tuition assistance to County residents attending SCC to be reasonably related to the public purpose of fostering industrial and economic development in the County.

In light of the above, we believe a court would likely conclude that the use of County funds to support the proposed scholarship program meets the public purpose test. The program would provide tuition assistance to County residents attending SCC, a post-secondary educational institution. Thus, we believe the program would serve the valid public purpose of promoting higher education in the County. Although assistance under the program is only available to residents attending a single institution, SCC is the only state-supported technical institution located within the County. The technical institutions of this state have the unique statutory purpose of enhancing economic development in the state through the education and training of individuals for employment in existing and prospective industries. Therefore, we believe a court would find the provisions of the program are reasonable related to the valid public purpose of fostering industrial and economic development in the County. Accordingly, this Office is of the opinion the County has the authority to fund the proposed scholarship program.

Inclusion of Private Institution in Program

You also ask whether the legality of the proposed scholarship program would be affected if students attending a private institution are also allowed to participate in the program. Clearly, it is

impossible for us to comment on the legality of such changes to the proposed program since we have not been provided with specifics as to how the details of the program would be modified and the type of institution that would be included. Thus, we can only provide you with the general advice on the matter based on the constitutional provisions implicated by the inclusion of a private institution in this program as well as case law addressing similar aid programs.

The inclusion of any private educational institution would implicate Article XI, section 4 of our state Constitution which prohibits the use of public funds "for the direct benefit of any religious or other private educational institution." See also S.C. Const. art. X, § 11 ("The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual...or any religious or other private education institution ...."). If the private institution to be included is also a religious institution, the program would implicate the Establishment Clauses of the federal and state constitutions. See U.S. Const. amend. I; S.C. Const. art. 1, § 2.

Our Supreme Court has issued two decisions, discussed below, addressing the constitutionality of legislation providing aid to students attending private educational institutions under former Article XI, section 9.[2] That provision prohibited the use of public funds, "*directly or indirectly*, in aid or maintenance of any college, school...or other institution...which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization." S.C. Const. Article XI, § 9 (current version at Article XI, § 4) (emphasis added).

In Hartness v. Patterson, 255 S.C. 503, 179 S.E.2d 907 (1971), the Court reviewed legislation providing tuition assistance to students attending "independent institutions of higher learning." The tuition grants were paid to students who were already accepted by or registered in an authorized institution; the students were then required by law to pay the grant money to the institution as part of their tuition. Id. at 507, 179 S.E.2d 907. Of the twenty-one schools in the state which met the statutory definition of an "independent institution of higher learning," the Court noted that sixteen were operated by religious groups or denominations. Id. at 506, 179 S.E.2d at 908. The Court rejected the argument that the tuition grants did not constitute aid to the participating schools because the grants were paid directly to the students and not the institutions:

> Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid....
>
> ... It is apparent that one of the main purposes of the tuition grant is to reduce the cost to a student for attending private colleges and thereby attract additional students to their campuses so as to fill vacancies in their student body. Such would have the effect of adding additional funds to their treasuries and thereby improve their financial status. It is perhaps better stated in respondent's brief as follows: "The indirect benefit accruing to the private colleges will consist of their being able to attract sufficient students to their campuses to continue to function." Such constitutes aid to the religious schools.

[2] Former Article XI, § 9 was amended and codified as Article XI, section 4 in 1973.

Id. at 507-08, 179 S.E.2d at 909. Thus, the Court held "the use of public funds under the Act to provide tuition grants to students attending the participating religious institutions constitutes aid to such institutions within the meaning of, and prohibited by, Article XI, Section 9 ...." Id. at 508, 179 S.E.2d at 909.

A year later, the Court upheld the validity of legislation authorizing a state agency to issue loans students attending "*any* institution of higher learning" in Durham v. McLeod, 259 S.C. 409, 412, 192 S.E.2d 202, 203 (1972) (emphasis added). In distinguishing this legislation from that which was struck down in Hartness, the Court emphasized the fact aid was provided to all eligible students regardless of whether they attended public or private institutions:

> In Hartness...we held that tuition grants to students attending independent institutions of higher learning amounted to aid to these institutions in violation of the section here relied upon. But the clear purpose of that Act was to aid "independent institutions of higher learning" as defined, of which sixteen out of a total of twenty-one which qualified were church supported. The direct tuition grants were, of course, of public money, and our conclusion that the Act violated Article XI, Section 9 was inevitable.
>
> In this case, the emphasis is on aid to the student rather than to any institution or class of institutions. All which provide higher education, whether public or private, sectarian or secular, are eligible. The loan is to the student, and all eligible institutions are as free to compete for his attendance as though it had been made by a commercial bank. This is aid, direct or indirect to higher education, but not to any institution or group of institutions. Even if it were conceded that the loan fund is public money within the meaning of Article XI, Section 9, it would require a strained construction to hold that participation by students attending Wofford, Furman, and like institutions, as well as by those attending the University of South Carolina, Clemson University and the like, offends this constitutional restriction. However, we think it clear that the student loan fund under the Act is held by the Authority as a trust fund, and that no public money or credit...is employed in making or guaranteeing loans.

Id. at 413, 192 S.E.2d at 203-04 (citation omitted).

As previously noted, Article XI, section 9 was amended after Hartness and Durham were decided, and the new Article XI, section 4 was made much narrower in scope. Significantly, the word "indirectly" was deleted from the current version of Article XI, section 4. In our efforts to ascertain the intent of the framers in transforming former Article XI, section 9 into the less restrictive, present day Article XI, section 4, we often refer to the Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 (1969) [West Committee]. The West Committee commented as follows:

> The Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of the private institutions, the Committee feels that public funds should not be granted outrightly to such

> institutions. Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word "indirectly" currently listed in Section 9. By removing the word "indirectly" the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs ....

Final Report at 100-101.

Relying on the above comments, we have observed that the framers sought to create a distinction between permitting the use of public funds to assist students who make the choice of whether to attend a private or sectarian institution, and prohibiting the government subsidization of sectarian or private schools. Op. S.C. Att'y Gen., 2003 WL 164474, *4 (January 7, 2003). "Thus, the framers of Art. XI, § 4, the people who voted for the amendment, as well as the General Assembly which ratified it, drew the line of demarcation between a violation and non-violation of the provision as being dependent upon whether the particular aid primarily benefits the student or the institution itself." Id.

Significantly, the Final Report also states the West Committee was guided by "interpretations being given by the federal judiciary to the 'establishment of religion' clause in the federal constitution" when drafting Article XI, section 4. Final Report at 99. Based on this fact, we have observed that United States Supreme Court decisions addressing Establishment Clause challenges to government student aid programs "would undoubtedly be relied upon by our Supreme Court in any challenge to a state student aid program under both Article XI, § 4 as well as Article I, § 2." Op. S.C. Att'y Gen., 2011 WL 1444725, *9 (March 21, 2011).[3]

Two such cases of particular relevance here are Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 106 S.Ct. 748 (1986), and Zelman v. Simmons-Harris, 536 U.S. 639, 122 S.Ct. 2460 (2002). In Witters, the Court held the Establishment Clause was not violated by the extension of assistance under Washington's vocational rehabilitation program for the visually handicapped to a blind individual studying to become a pastor, missionary, or youth director at a private Christian college. The Court provided, in relevant part, the following reasoning in support of its holding:

> As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is "made available generally without regard to the sectarian-

[3] In this same opinion, we noted that our Supreme Court "has recognized that the Establishment Clause in the South Carolina Constitution is coextensive with that of the federal Constitution." Op. S.C. Att'y Gen., 2011 WL 1444725, *4 (March 21, 2011) (citing Hunt v. McNair, 258 S.C. 97, 103, 187 S.E.2d 645, 648 (1972) ("The language of the first amendment to the Constitution of the United States and the language of Article I, Section 4, of the Constitution of South Carolina are, for all intents and purposes, the same. Accordingly, our reasoning is applicable to both constitutional provisions.")).

> nonsectarian, or public-nonpublic nature of the institution benefited," and is in no way skewed towards religion. It creates no financial incentive for students to undertake sectarian education. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.

Witters, 474 U.S. at 488, 106 S. Ct. at 752 (1986) (citations omitted) (emphasis added).

Likewise, the Court in Zelman held Ohio's Pilot Project Scholarship Program did not violate the Establishment Clause. In so doing, the Court observed that its prior decisions, like the West Committee's Final Report, "have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." Id. at 649, 122 S.Ct. at 2465 (citations omitted). Noting that Establishment Clause challenges to "true private choice programs" were rejected in Witters and two other prior cases,[4] the Court summarized the jurisprudence of these cases as follows:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. As a plurality of this Court recently observed:
>
> > "[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." Mitchell [v. Helms, 530 U.S. 793, 810, 120 S.Ct. 2530, 2542 (2000)].

Id. at 652, 122 S. Ct at 2467.

---

[4] See Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062 (1983); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S.Ct. 2462 (1993).

Relying on the jurisprudence of these prior cases, the Zelman Court found the Ohio program to be a constitutionally valid "program of true private choice":

> As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.,* any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

Id. at 653, 122 S. Ct. at 2467-68.

In consideration of the Court's analysis in Zelman and Witters, we must express doubt as to whether the inclusion of a private institution in the proposed scholarship program would be upheld as constitutional under Article XI, section 4, or under Article I, section 2, if the private institution is also a religious institution. Unlike the programs of "true private choice" upheld in Zelman and Witters, the program at hand would, at best, give participants two choices of where to direct County funds; SCC or an unnamed private or religious institution. Such a limitation upon the aid recipients' ability to genuinely and independently choose where to direct the County funds could be construed by a court as an improper grant of special favors to the benefit of the private or religious institution designated by the County. Furthermore, such a limitation would likely channel a large part of the program's benefits to students attending the private or religious institution, an aspect the Court specifically noted was absent from the program upheld in Witters. See Witters, 474 U.S. at 488, 106 S.Ct. at 752 ("...nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions"). Accordingly, this Office is of the opinion that the inclusion of a private institution in the proposed scholarship program may run afoul of Article XI, section 4, as well as Article I, section 2, if the institution is also a religious one.

Very truly yours,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General